Supreme Court, U.S.
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No. 03-569

IN THE

Supreme Court of the United States

ALLIANT ENERGY CORPORATION,

Petitioner,

v.

BURNEATTA BRIDGE, AVE M. BIE and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MADISON GAS & ELECTRIC COMPANY AND MGE ENERGY, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Like petitioner Alliant Energy Corporation ("Alliant"), MGE Energy is a public utility holding company, incorporated and operating in Wisconsin.[1] MGE Energy is subject to the very provisions of the Wisconsin Utility Holding Company Act ("WUHCA") that Alliant has challenged in this action. Nonetheless, MGE Energy's position on these regulations is precisely the opposite of Alliant's.

From the outset of this litigation in October 2000, Alliant has maintained that the challenged provisions of state law "unlawfully interfer[e] with [its] corporate operations, autonomy and [its] ability to fulfill [its] corporate objectives . . . ." Second Amended Complaint, District Court Record ("N.R." 44), ¶ 32. Alliant now contends as well that consolidation of the entire interstate utility market is "the most efficient way to ensure delivery of reliable electric services in the United States" and that the challenged provisions are impeding that consolidation. *See* Alliant's Petition for Writ of Certiorari ("Petition"), p. 5.

MGE Energy does not share Alliant's views. That is why Madison Gas & Electric Company ("MGE"), MGE Energy's wholly owned utility subsidiary and one of the five major investor-owned electric utilities in Wisconsin, participated in this case before the district court. It is also why MGE Energy, which became the newest Wisconsin

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[1] Each party's written consent for the submission of this brief is on file with the Clerk of the Court. Pursuant to Rule 37.6, Madison Gas & Electric Company and MGE Energy state that no counsel for any party authored this brief in whole or in part and that no party or entity other than MGE and MGE Energy, their affiliates, or counsel made a monetary contribution to the preparation or submission of this brief.

public utility holding company when it formed in August 2002, participated before the United States Court of Appeals for the Seventh Circuit.

MGE and MGE Energy, and the consumers they serve, obtain direct benefits from WUHCA. To protect those benefits, MGE has long opposed the haphazard deregulation of the utility industry by the state legislature, unconvinced that the "promise" of deregulation offers any advantages to its ratepayers or shareholders. MGE and MGE Energy continue to take part in the deregulation debate, even as Alliant has tried to shift the focus of that debate from the state legislature to the federal judiciary. The ramifications of deregulation would be dramatic, and any changes should be made only after careful consideration and participation by everyone involved in Wisconsin's energy industry. Alliant should not be the only one with a voice in the matter.

MGE and MGE Energy have a direct interest in Alliant's financial strength and operational priorities. Alliant is the contractually-designated operator of MGE's largest electrical generating asset, the Columbia Energy Center. Any turmoil at Alliant could ultimately affect its ability to provide safe, affordable and reliable energy to MGE's ratepayers. The Seventh Circuit's decisions in this case make turmoil far less likely because they uphold the state regulations that guarantee that utility holding companies will focus on utility service. The court's decisions were correct. Review by this Court is unwarranted.

SUMMARY OF ARGUMENT

The Seventh Circuit issued not only one, but two, decisions rejecting Alliant's arguments in this case. Those decisions are entirely consistent with this Court's precedent and with case law in the two other circuits that have

addressed this topic. There is no circuit split for this Court to resolve. There is no error to correct. Alliant simply wants to try to make new law where the law is already settled. It wants the federal judiciary to do what the state legislature has not done -- deregulate public utility holding companies. This Court should reject Alliant's request to do that.

REASONS FOR DENYING THE PETITION

In its petition, Alliant describes a rapidly consolidating national utility industry and portrays the challenged provisions as standing in the way of that consolidation in Wisconsin. Alliant even proclaims that consolidation is the "most efficient way to ensure delivery of reliable electric services in the United States...." Petition at 27. But the energy industry, and the regulation of that industry, are not as Alliant would have this Court believe. Moreover, any changes to the current regulatory system should take place in the legislative, not the judicial, arena.

I. DEREGULATION OF THE ELECTRIC INDUSTRY IS AN ISSUE FOR THE STATE LEGISLATURE OR CONGRESS, NOT THIS COURT.

Not since 1935, when Congress first recognized the pervasive abuses of public utility holding companies, has the importance of regulating public utilities and their holding companies been so apparent. In California, a failed deregulation experiment led to the bankruptcy of that state's largest public utility, Pacific Gas & Electric, along with chronic power shortages, rolling blackouts and unconscionable price increases for ratepayers. Nationwide, the devastating economic effects of the Enron scandal and tragedy are still being tabulated, now with criminal indictments. The collapse of this huge unregulated energy

company left employees jobless, investors profitless, and utility customers unprotected. Just this summer, the East Coast blackout highlighted concerns over the regulation of the nation's electric transmission system.

Seemingly oblivious to the devastating effects of deregulation -- and, correspondingly, to the benefits of regulation -- Alliant has sought to cast off the regulatory chains with which, it claims, the State of Wisconsin has shackled it. Indeed, with billions of dollars in assets, Alliant has expressed its fervent hope to reincorporate in Delaware to escape the very regulations the Wisconsin legislature has determined are necessary to ensure the continued provision of safe, reliable and economical energy. N.R. 80 (Affidavit of Errol B. Davis, Jr., Alliant's Chairman, President and Chief Executive Officer).

The Seventh Circuit twice rejected Alliant's Commerce Clause and Equal Protection claims with respect to four of the five challenged statutory provisions. *See* Wis. Stat. § 196.53 ("the in-state public utility provision"), § 196.795(3) ("the takeover provision"), § 196.795(6m)(b) ("the asset cap"), and § 196.795(5)(a) and (7)(a), § 201.01(2) and § 201.03(1) ("the securities regulation provisions"). At the heart of the court's decisions was the determination that these statutes are an appropriate exercise of the state's authority to protect the public interest. When Alliant sought rehearing *en banc*, the court reiterated that determination and explained, again, why Alliant's position was wrong.

The Wisconsin legislature adopted the challenged regulations to help ensure that the public utility holding company structure would not be used to the detriment of utility ratepayers. The Seventh Circuit recognized that, maintaining the critical protections that the state legislature has adopted for its citizens.

If this Court were to take this case and overturn the Seventh Circuit, Wisconsin would lose much of its authority over utility holding companies. Moreover, given the close, symbiotic relationship between the parent company and its utility subsidiaries, a loss of regulatory oversight over the holding company inevitably will mean less regulatory oversight for the utility subsidiaries. MGE and MGE Energy do not want that to happen -- and there is no reason for it to happen unless the state legislature or Congress decides to change course.

A. Both Wisconsin and the United States Have Long Regulated Public Utilities and Public Utility Holding Companies.

Wisconsin has required in-state incorporation for its utilities for almost 100 years. Wis. Stat. § 196.53. Public utility holding companies have been subject to federal regulation since 1935 and to state regulation since 1985. This lawsuit is the first judicial challenge to any of Wisconsin's regulatory provisions. Ironically, this challenge was brought in part by WPL, Alliant's wholly-owned utility subsidiary, and one of the first utilities to benefit from the same holding company provisions it now proclaims unconstitutional.

Wisconsin's Regulation Of Public Utilities

In 1907, Wisconsin became the first state to regulate all public utilities. *See* Wisconsin Legislative Reference Bureau, *State of Wisconsin Blue Book* 478 (2003-04). In 1931, the state legislature created the Public Service Commission. *Id.*; Wis. Stat. § 15.79. Today, the PSC has broad authority to "supervise and regulate" Wisconsin's public utilities and some of the activities of public utility

holding companies. Wis. Stat. § 196.02(1). It also ensures that utility services are provided at reasonable prices. *Id.* The PSC's jurisdiction is "broad, comprehensive and all-inclusive." *Wisconsin Power & Light Co. v. Public Service Comm'n of Wisconsin*, 148 Wis. 2d 881, 891, 437 N.W.2d 888 (Ct. App. 1989).

The Wisconsin Utility Holding Company Act, 1985 Wis. Act 79, became law on November 19, 1985. In short, the Act was designed primarily to maintain the financial health of the utilities themselves by encouraging the economic development, in Wisconsin, that would result from utility diversification -- at the same time preserving the regulation necessary to maintain safe and reliable electric service for the state's utility customers.

The Federal Public Utility Holding Company Act Of 1935

Fifty years earlier, Congress had passed the Public Utility Holding Company Act ("PUHCA"), 15 U.S.C. § 79 *et seq.*, in an effort to impose reasonable regulatory constraints on public utility holding companies. Prior to adopting this legislation, Congress conducted an exhaustive inquiry into the abuses of utility holding companies, finding that their unchecked growth had "too frequently given us massive, overcapitalized organizations of ever-increasing complexity and steadily diminishing coordination and efficiency." *Report of the National Power Policy Committee on Public Utility Holding Companies*, H.R. Doc. No. 74-137, p. 5 (1935).[2] Moreover, Congress determined that these complicated structures fostered financially irresponsible

[2] The Congressional findings of corporate abuse that led to the enactment of PUHCA followed some of the most comprehensive studies ever to underlie a federal statute. *See North American Co. v. Securities and Exchange Comm'n*, 327 U.S. 686, 701 n.11 (1946).

management and unsound capital structures. *See Federal Trade Commission Report to the Senate, "Utility Corporations,"* S. Doc. No. 70-92, Part 72 -- A, p. 860 (1927).

Based on these findings, Congress imposed a number of remedial structural requirements on utility holding companies. The Supreme Court validated that policy decision, finding as early as 1946 that Congress had ample Commerce Clause authority, and reason, to enact PUHCA:

> Public utility holding companies are...able to build their gas and electric utility systems, often gerrymandered in such ways as to bear no relation to economy of operation, or to effective regulation. The control arising from this ownership of securities also allows such holding companies to exact unreasonable fees, commissions and other charges from their subsidiaries, to make undue profits from the handling of the issue, sale and exchange of securities for their subsidiaries, to issue unsound securities of their own based upon the inflated value of the subsidiaries, and to affect adversely the accounting practices and the rate and dividend policies of the subsidiaries.

North American Co. v. Securities and Exchange Comm'n, 327 U.S. 686, 701 (1946); *see also American Power & Light Co. v. Securities & Exchange Comm'n*, 329 U.S. 90, 99-104 (1946) (upholding other elements of PUHCA).

Not only did the Supreme Court affirm Congressional authority to regulate utility holding companies under PUHCA, the Court also found that part of the law's purpose was to "rejuvenate local utility management and *to restore effective state regulation*, both of which had been seriously impaired by the existence and practices of nation-wide holding compan[ies]. . . ." *North American Co.*, 327 U.S. at 704 (emphasis added). This dual system of federal and state regulation of utility holding companies is at the "heart" of PUHCA. *Id.* at 704 n.14; *see also Rochester Telephone Corp. v. Public Service Comm'n of State of New York*, 614 N.Y.S.2d 454, 457 (N.Y. App. Div. 1994), *aff'd*, 660 N.E.2d 1112 (N.Y. 1995); *Alabama Electric Co-op., Inc. v. Securities and Exchange Comm'n*, 353 F.2d 905, 907 (D.C. Cir. 1965); Jeffrey W. Knapp, Comment, *Effective State Regulation of Energy Utility Diversification*, 136 U. Pa. L. Rev. 1677, 1694 (1988).

The Congressional findings underlying PUHCA emphasized that individual states have a distinct, unique and compelling interest in regulating the corporate structure of utilities and utility holding companies operating within their borders. The Seventh Circuit itself recognized that the Wisconsin legislature was very cognizant of these concerns when it adopted WUHCA:

> The existence of a holding company creates the opportunity and incentive for deceptive practices such as cross-subsidization from the regulated public utility to a non-regulated subsidiary. It is not surprising that when Wisconsin finally decided to authorize the existence of public utility holding companies [in 1985,] they [*sic*] accompanied that authorization with statutory provisions

> allowing for government control of the financial structure and activities of such companies.

Alliant's Appendix ("App."), pp. 17a-18a.

The energy legislation pending before Congress today would repeal PUCHA. H.R. 6 (As Amended and Passed by the Senate), 108th Cong., § 223 (2003). The proposal's enactment would make state public utility holding company regulations, such as WUHCA, all the more important. Indeed, it would reaffirm the indispensable role for state regulation long recognized both by Congress and this Court. If Alliant's petition were granted and the decision of the Seventh Circuit reversed, the validity of every state's regulatory system would be cast in doubt at the very time it was most needed!

B. State Regulation of Public Utility Holding Companies is Essential to Ensuring Financially Stable Public Utilities.

The regulation of utilities, the Seventh Circuit acknowledged, is one of the most important of the functions traditionally associated with the police power of the states. *See* App. at 32a (citing *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)); *see also General Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 205-06 (1983). An integral part of the state's ability to protect consumers is the authority to regulate the corporate structure of public utilities. *See Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1424 (4th Cir. 1985), *cert. denied*, 474 U.S. 847, (citing *Great Northern Railway Co. v. Washington*, 300 U.S. 154, 160 (1937)).

Much as Alliant may dislike the state's regulatory authority, it is not free to ignore it. Alliant is, after all, a public utility holding company that exists *solely* because the state legislature, in WUHCA, chose to permit utility holding companies and give them the opportunity to expand into nonutility ventures.

The state's decision to allow limited economic expansion -- beyond the core function of a public utility -- does not mean, however, that the state has ceded its oversight of the utility industry. Indeed, given the direct economic and managerial links between a utility and its holding company, the state's regulatory interests have increased as a result of WUHCA, rather than diminished. Regulatory oversight of the public utility holding company is essential to continued regulatory oversight of the utility.

Alliant tried to convince the Seventh Circuit to disregard the compelling basis for regulation simply because Wisconsin's regulations impose such allegedly grievous restrictions. It failed, and this Court should not allow Alliant to revive those efforts. With the state-conferred benefits of an exclusive service territory -- that is, a monopoly -- and prices designed to assure a reasonable opportunity for a fair return, come the "burdens" of regulation. There is no avoiding this benefit-burden balance in the public utility industry. The state has given Alliant and WPL an invaluable franchise. In return, to protect ratepayers who have no service alternatives, Wisconsin has a reasonable right to regulate. And that is exactly what it has done through WUHCA.

To the extent that Alliant wants more "benefit" than "burden," its forum is the state legislature, not this Court. Alliant is a significant Wisconsin corporation with no small

ability to make itself heard in the state legislature. The dormant Commerce Clause is designed to protect out-of-state parties -- parties, not incidentally, without an adequate voice in the state political process -- from economic protectionism. But the structural regulations challenged by Alliant are not protectionist. Moreover, as the Seventh Circuit noted, any extraterritorial effect the regulations have is countered by a "corresponding and significant protection for a legitimate interest of local residents." App. at 9a.

II. THE SEVENTH CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THE RELEVANT ISSUES – TWICE.

The Seventh Circuit issued its initial decision in this case on May 29, 2003, 330 F.3d 904, App. at 10a, upholding four of the five challenged provisions of WUHCA. Dissatisfied with that outcome, Alliant filed a petition for rehearing *en banc*. On July 14, 2003, the court not only denied that petition, it issued a nine-page opinion explaining the basis for its decision and, in the process, criticized Alliant for its shifting arguments. 336 F.3d 545, App. at 1a.[3]

A. The Seventh Circuit's Decisions are Consistent with this Court's Precedent.

The issues that Alliant has asked this Court to review are, in significant part, the issues that the Seventh Circuit addressed in its second opinion. Although Alliant had not "fully developed" those issues in its original appellate briefs, the court nonetheless took the time to address them in its second decision. App. at 2a.

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[3] Alliant's petition was denied because not a single judge in active service requested a vote on it. App. at 2a.

Alliant now suggests that the Seventh Circuit erred in two critical ways. First, Alliant maintains that the court applied the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) to the challenged statutes rather than using a *per se* invalidity test. According to Alliant, the challenged provisions are extraterritorial state regulation of interstate commerce and, accordingly, the *per se* invalidity analysis must be applied. Second, Alliant argues that even in applying the *Pike* balancing test, the court failed to consider other state statutes that would sufficiently protect the same state interests.

Alliant is wrong on both counts. The Seventh Circuit's decisions are fully consistent with this Court's precedent. Even if the Seventh Circuit had gone astray, however, that would not make this case appropriate for review. Under this Court's own rules, it does not typically grant review when the asserted error consists of "misapplication of a properly stated rule of law." Sup. Ct. R. 10.

The Seventh Circuit's Application of the* Pike *Balancing Test was Appropriate

Alliant spends much of its petition trying to establish that, under this Court's jurisprudence, *any* state laws that have *any* extraterritorial application are *per se* invalid. According to Alliant, once the Seventh Circuit determined that the challenged statutes regulate interstate commerce extraterritorially, it should have immediately found them invalid without resort to the *Pike* balancing test. *See* Petition at 8 ("Extraterritorial regulation by a state, even if the statute also has effects within the state, is always *per se* invalid.").

The Seventh Circuit rejected this precise argument, of course, explaining that:

> [Alliant] claims that such precedent mandates the *per se* invalidation of *every* state regulation that has any extra-territorial effect whatsoever. This principle is not established by the cases [Alliant] cite[s] and is contradicted by other authority.

App. at 2a.

> [Alliant has] sought to invalidate the statute as violating the interstate commerce clause, and [has] failed to explain, other than citation to the supposedly supporting authority, why we shouldn't apply the traditional approach applied to all claims under the interstate commerce clause. And contrary to [Alliant's] contentions the cases cited stand only for the unsurprising principle that a *direct or facial* regulation of wholly extraterritorial transactions is *per se* invalid, which is an unremarkable application of the traditional two-tiered [dormant commerce clause] approach.

Id. at 3a (emphasis in original).

Nonetheless, Alliant takes aim at the Seventh Circuit's second opinion, parsing each of the decisions it relied on in an attempt to show that the Seventh Circuit "misunderstands" controlling Supreme Court precedent. Petition at 21. It is Alliant, however, not the Seventh Circuit, that is mistaken.

Alliant relies principally on four decisions of this Court: *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987); and *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989). Each of these cases, according to Alliant, stands for the proposition that regulations with any extraterritorial effect are always *per se* unconstitutional.

Alliant maintains that, in *Edgar*, a plurality of the Court applied *per se* scrutiny to the challenged extraterritorial legislation. Petition at 8-10. As the Seventh Circuit noted, however, that plurality opinion, by Justice White, was not as broad as Alliant suggests and, in any event, it did not have the support of a majority of the court. App. at 4a-5a.

Alliant attempts to overcome the non-binding status of the *Edgar* plurality by suggesting that this Court later adopted that reasoning in *Brown-Forman*. *See* Petition at 10 n.3. The Seventh Circuit properly rejected that argument, finding that while this Court did cite *Edgar* approvingly in *Brown-Forman*, it was simply acknowledging the uncontroversial proposition that *direct* regulation of interstate commerce by the states is *per se* unconstitutional. *Id.* The Court in *Brown-Forman* did not adopt the position that extraterritorial effects will always invalidate a statute regardless of the local benefit. App. at 5a.

Indeed, this Court emphasized in *CTS Corp.*, another of the decisions relied upon by Alliant, that the *Edgar* plurality was not binding. 481 U.S. at 81 ("As the plurality opinion in [*Edgar*] did not represent the views of a majority of the Court, we are not bound by its reasoning. . . ."). Significantly, the Court in *CTS Corp.* explicitly rejected a *per se* invalidity test and went on to uphold the challenged

legislation. *Id.* at 83; *see* App. at 7a-8a. In its decision, this Court reiterated that it had no authority to "second-guess the empirical judgments of lawmakers concerning the utility of legislation," *id.* at 92, precisely the exercise Alliant asks the Court to undertake here.

Finally, Alliant points to *Healy*, a decision that in Alliant's view adopts the relevant language of *Edgar*, much like it says *Brown-Forman* did. *See* Petition at 13 n.4. However, *Healy* did not do that. *See* App. at 6a-7a. It involved direct extraterritorial price regulation, which is a far cry from the legislation at issue here. Like *Brown-Forman*, *Healy* simply reiterated that *direct* regulation of interstate commerce is subject to a *per se* invalidity test.

None of these decisions adopts the across-the-board *per se* invalidity test for extraterritorial regulation that Alliant advances. In fact, *CTS* explicitly rejects it. *See* App. at 7a-8a ("*CTS* says that when a state regulates internal matters and the regulations have external effects, the regulations are not *per se* invalid."). The Seventh Circuit applied this Court's precedent exactly as it should have. Accordingly, there is no need for this Court to review the Seventh Circuit's decisions.[4]

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[4] Even if this Court were to find a need to revisit *Edgar* or *CTS*, or to address the Commerce Clause's applicability to interstate utility regulation, this is a singularly inappropriate case. The petitioner is a Wisconsin public utility holding company that owns and operates a Wisconsin public utility. It has been subject to WUHCA for almost 20 years -- without a word of protest until this case began.

Alliant is not a non-resident corporation hamstrung by state legislation that benefits resident corporations. Nor is Alliant a non-resident investor clamoring for the opportunity to purchase shares or utility assets but frustrated by a state's protectionist system. While Alliant's legal standing is not literally at issue, *see* App. at 14a n.4, its "plight" does not provide this Court with an appropriate platform to address a state's

The Seventh Circuit Considered Whether Other State Statutes Would Protect Wisconsin's Interests

In addition to arguing that the Seventh Circuit applied the wrong test to the challenged legislation, Alliant maintains that even if the court used the right test, it did not apply it properly. According to Alliant, the Seventh Circuit altered the *Pike* balancing analysis by failing to consider other state statutes that, in Alliant's view, would "fully" protect Wisconsin's interests without burdening interstate commerce. Petition at 23. Alliant even goes so far as to suggest that the Seventh Circuit "refused to consider" the unchallenged holding company act provisions. *Id.* at 24.

The court did nothing of the sort. Rather, the court said this:

> Alliant also argues that these structural provisions are invalid because they are redundant of other regulations. These other regulations are laws that prohibit deceptive practices. This argument must fail. A State is serving a legitimate purpose when it passes structural regulations to serve as a back up to prohibitions.

App. at 35a-36a. The court also quoted a long passage from *Baltimore Gas & Electric Co.*, 760 F.2d 1408, in which the Fourth Circuit explained precisely why overlapping regulatory provisions for public utility holding companies are perfectly acceptable. App. at 36a.

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regulation of its own public utility holding companies, regulation designed to protect state business and residential consumers.

Although the Seventh Circuit did not discuss each and every one of the provisions of WUHCA in its decision, it need not have. The court's analysis showed that it was well aware of its responsibility to consider whether other WUHCA regulations sufficiently protected the citizens of Wisconsin. The court simply found that Wisconsin did not need to handcuff itself by foregoing structural regulation.

As the PSC defendants' expert, Scott Hempling, explained at length in his affidavit supporting the defendants' motion for summary judgment, N.R. 69, "structural" regulations are not rendered unnecessary simply by the existence of other laws that "prohibit" certain conduct. This Court has long held that an integral part of a state's ability to protect consumers is the authority to regulate the corporate structure of public utilities. *See Great Northern Railway Co.*, 300 U.S. at 160. As Mr. Hempling stated, "[s]tructural regulation [] can facilitate more effective regulation with fewer resources. Upfront review reduces the need for after-the-fact oversight and correction." N.R. 69, ¶ 39.

The Seventh Circuit's relatively brief discussion of this question hardly means that it ignored the topic. Rather, it shows that the court gave the argument the attention it deserved. In any event, even if the Seventh Circuit had totally failed to consider whether other regulations adequately serve the same purpose as the challenged regulations, that would not be reason for this Court to grant Alliant's petition. Again, the form and adequacy of regulation are ultimately a legislative determination. Mere error by a circuit court, moreover, even assuming it occurred, is not one of the grounds that this Court has established for review.[5]

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[5] Alliant seems to suggest that the Seventh Circuit misapplied its own precedent as well, arguing that its decisions here conflict with *Dean*

B. The Seventh Circuit's Decisions Are Consistent with Case Law in Other Circuits.

In its effort to convince the Court to take this case, Alliant suggests that "[t]he Seventh Circuit is not the only court recently to misapply the Commerce Clause extraterritorial analysis to utility regulation." Petition at 20. Alliant maintains that the Eighth Circuit in *Southern Union v. Missouri Pub. Serv. Comm'n*, 289 F.3d 503 (8th Cir. 2002), impermissibly "carved out a utility exception to extraterritorial Commerce Clause analysis." Petition at 20. According to Alliant, the "Eighth Circuit in *Southern Union* and the Seventh Circuit appear to misunderstand this Court's extraterritoriality principle." *Id.* at 21.[6]

Contrary to Alliant's argument, *Southern Union* simply shows that there is no disagreement in the circuits about the application of the Commerce Clause in the utility setting. The Seventh and Eighth Circuits are entirely consistent in their application of this Court's precedent. These courts do not "misunderstand" the relevant jurisprudence. Like the Seventh Circuit, the Eighth Circuit

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Foods Co. v. Brancel, 187 F.3d 609 (7th Cir. 1999), and *National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995). Whether that is true or not, however, it has no bearing on whether this Court should take the case. If the Seventh Circuit had believed that its decisions in this case conflicted with *Dean Foods* and *Meyer*, it would have granted Alliant's petition for rehearing *en banc*. The Seventh Circuit is perfectly capable of identifying and resolving any internal inconsistencies on its own.

[6] Like the Seventh Circuit here, the Eighth Circuit in *Southern Union* denied a petition for rehearing *en banc*. 2002 U.S. App. LEXIS 14352 (8th Cir. July 12, 2002).

determined that a *per se* invalidity test was inappropriate. 289 F.3d at 508. It further pointed out that in recent Commerce Clause decisions, this Court has limited its *per se* invalidity rule "to provisions that patently discriminate against interstate trade." *Id.* (citing *Associated Indus. v. Lohman*, 511 U.S. 641, 647 (1994)). There was no such patent discrimination in *Southern Union* and no such discrimination here.

Moreover, it is not just the Seventh and Eighth Circuits that are in accord. The Fourth Circuit in *Baltimore Gas & Electric Co.*, 760 F.2d 1408, reached much the same conclusion almost 20 years ago. In *Baltimore Gas*, the Court of Appeals rejected a constitutional challenge to Maryland's public utility holding company law that was remarkably similar to the challenge by Alliant in this case. Applying the *Pike* balancing test, the court explained that it had "no doubt" that the interests served by the law were legitimate, especially given the well-documented history of abuse of the holding company structure. *Id.* at 1424-25.[7] The burdens imposed by the law, said the court, were "necessitated by the very notion of control of a public utility's corporate structure and investments" and, at that, the burdens were outweighed by the state's interest in protecting its consumers. *Id.*[8]

The Fourth, Seventh, and Eighth Circuits are not wrong. Rather, it is Alliant that is mistaken.

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[7] The Arizona Supreme Court also applied the *Pike* balancing test to similar legislation in *Arizona Corp. Comm'n v. State*, 830 P.2d 807, 819 (Ariz. 1992).

[8] This Court denied Baltimore Gas & Electric's petition for writ of *certiorari*. 474 U.S. 847 (1985). The Court should do the same in this case.

CONCLUSION

For all the foregoing reasons, MGE and MGE Energy respectfully ask that the Court deny Alliant's Petition for Writ of *Certiorari*.

Respectfully submitted,

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